

UNITED STATES
v.
WILLIAM T. ALEXANDER

IBLA 78-476 (On Court Remand)

Decided May 21, 1979

Proceeding after administrative hearing on remand from the United States District Court for the District of New Mexico for reconsideration of the Board's decision in William T. Alexander, 21 IBLA 56 (1975), in light of Skelly Oil Co. v. Morton, Civil No. 74-411 (D.N.M. August 7, 1975).

Bureau of Land Management (BLM) decision rejecting oil and gas lease offer NM-20947 is affirmed. Prior Board decision is reaffirmed as modified.

1. Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases:
Known Geological Structure -- Secretary of the Interior

The failure of the BLM officer to follow the procedure set out in a Secretarial Order requiring all offers, prior to issuance of a lease, to be sent to Geological Survey for a determination of whether the lands are within a known geologic structure, renders the signing of the lease unauthorized, and thus not binding on the Secretary.

2. Oil and Gas Leases: Generally -- Oil and Gas Leases: Known
Geological Structure

Generally, the signing of an oil and gas lease by the authorized officer of the Bureau of Land Management is the act that constitutes issuance of the lease. When land is determined to be within a known geologic structure prior to authorized issuance of a lease, non-competitive lease offers must be rejected and the land may be leased only by competitive bidding.

3. Oil and Gas Leases: Known Geological Structure

One who challenges the classification of lands as within a known geologic structure has the burden of showing that the determination is in error, and the classification will not be disturbed in the absence of a clear and definite showing of error.

APPEARANCES: Don M. Fedric, Esq., Hunter-Fedric, P. A., Roswell, New Mexico, for appellant; Gayle E. Manges, Esq., Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

William T. Alexander's oil and gas lease offer NM-20947 was drawn number one for Parcel No. 52 at the February 6, 1974, drawing. On March 12, 1974, the Chief, Minerals Section, New Mexico State Office, Bureau of Land Management (BLM), signed a lease form with the effective date of the lease designated April 1, 1974. The lease form was stamped with the following inscription: "This lease is subject to the determination by the Geological Survey as to whether the lands herein described were on a known geologic structure of a producing oil or gas field as of the date of signing hereof by the authorized officer."

The lease form was then sent to Geological Survey (Survey) to determine whether the lands were on a known geologic structure (KGS). On March 25, 1974, Survey determined the land to be in an undefined addition to the Catclaw Draw Field undefined KGS, effective February 27, 1974. BLM rejected the lease offer on March 29, 1974. Appellant appealed to the Board of Land Appeals and on June 18, 1975, we affirmed BLM's decision. William T. Alexander, 21 IBLA 56 (1975).

Appellant then sought judicial review of the Board's decision in Alexander v. Frizzel, Civil No. 75-538, in the United States District Court for the District of New Mexico. On August 7, 1975, Skelly Oil Co. v. Morton, Civil No. 74-411 (D.N.M.), was decided and the Government requested that the Alexander case be remanded for consideration in light of Skelly (discussed *infra*). After considering Skelly and the Board's decision in Nola Grace Ptasynski, 28 IBLA 256 (1976), *aff'd*, Ptasynski v. Hathaway, Civil No. 75-282-M (D.N.M. May 5, 1977), in a decision dated December 22, 1976, 28 IBLA 277, we remanded the Alexander case to the Hearings Division, Office of Hearings and Appeals, for a hearing before an administrative law judge to establish a factual record on three questions:

1. Did Martinez, the BLM officer who signed the lease, have information from Survey concerning the status of the land prior to signing the lease form;
2. When, and under what circumstances, did Survey make the determination that the lands are within a KGS;
3. Did Survey have sufficient information to make the KGS determination.

28 IBLA 277, 280 (1976).

The hearing was held on December 7, 1977, in Roswell, New Mexico, and the Recommended Decision of Administrative Law Judge Michael J. Morehouse was rendered on May 17, 1978. The Recommended Decision concluded that Martinez had no information from Survey concerning the KGS classification of the land prior to signing the lease form, and that Survey had sufficient information to make the KGS determination on March 25, 1974.

Appellant asserts two major exceptions to the Recommended Decision. The first goes to the issue of whether Martinez's signing the lease form binds the Department. Appellant contends that Martinez had information from Survey that the land involved was not within a KGS at the time he signed the lease. Alternatively, he asserts that the decision in Nola Grace Ptasynski, supra, is distinguishable from the instant case.

[1] Under Ptasynski, supra, the failure of the authorized officer to follow the procedure set out in a Secretarial Order in effect at all relevant times, requiring all offers, prior to issuance of a lease, to be sent to Survey for a determination of whether the lands are within a KGS, renders the signing of the lease unauthorized, and thus not binding on the Secretary. See 28 IBLA at 262, and cases cited therein. Appellant seeks to distinguish the instant case from Ptasynski, relying on the fact that the land was not within a KGS at the time of posting and that BLM routinely inquires of Survey, prior to posting, as to recent drilling or production activities on the land which might entitle the former lessee to an extension (Tr. 57).

The sending of lists of lands to be posted to Survey, prior to posting, is not the KGS determination contemplated by Secretarial Order No. 2948. The Secretarial Order entitled "Division of Responsibility Between the Bureau of Land Management and the Geological Survey for Administration of the Mineral Leasing Law -- Onshore," dated October 6, 1972, reads in part, as follows:

Sec. 3. Issuance of Mineral Leases, Permits and Licenses

(a) Applications. Prior to the issuance of * * * leases * * * the Bureau of Land Management refers all applications for such * * * leases * * * to the Geological Survey for a report as outlined in (b) below.

* * * * *

(5) All applications for noncompetitive oil and gas * * * leases filed with the Bureau of Land Management will, prior to the issuance of a lease, be referred to the Geological Survey for a determination as to whether the lands are within a known geologic structure * * *.

This order was issued as a policy directive and as such was binding on the Department. Cf. Republic Steel Corporation, 5 IBLA 306, 82 I.D. 607, 608-9 (1975). The order requires a Survey determination of KGS status prior to issuance of leases, not merely prior to posting the land. By signing the lease form before sending it to Survey, Martinez violated the procedure required by the Secretary's Order; therefore, his signature was unauthorized on March 12, 1974, and does not bind the Secretary to issue the lease. There are no valid distinctions between this case and Ptasynski and Ptasynski controls here.

[2] Generally, the signing of a lease by the authorized officer of BLM is the act that constitutes issuance of the lease, 43 CFR 3111.1-1(c); Barbara C. Lisco, 26 IBLA 340 (1976). When land is determined to be within a KGS prior to issuance of a lease, noncompetitive lease offers must be rejected and the land may be leased only by competitive bidding, 30 U.S.C. § 226 (1970); 43 CFR 3101.1-1, 3110.1-8; Curtis Wheeler, 31 IBLA 221 (1977); Guy W. Franson, 30 IBLA 123 (1977); David A. Provinse, 27 IBLA 376 (1976).

The fact, as appellant contends, that Martinez followed some prior BLM practices in signing the lease, with the condition that it was subject to a KGS determination by Survey, before sending it to Survey, did not mean that his action was authorized. The order of the Secretary, as discussed in Ptasynski, set forth the proper procedure, and actions which did not follow that procedure were not authorized. In signing the lease offer, albeit conditionally only, as the Secretary's agent, Martinez was not authorized to bind the Secretary. To the extent we assume, arguendo, that there was a lease issuance when Martinez conditionally signed the offer (which was never delivered to appellant), the action was voidable and it was appropriate in the

circumstances to cancel the lease. The offer remained with priority of filing. However, as no authorized action to issue a lease was taken, upon the determination that the land was within a KGS, the offer had to be rejected as there was no longer statutory authority to lease the land noncompetitively. 43 CFR 3110.1-8.

Appellant's second major exception to the Recommended Decision goes to the Judge's finding that Survey had sufficient information on March 25, 1974, to make the determination that the KGS extended to land covered by appellant's lease offer. Appellant objects to the Judge's analysis of the evidence, contending he overlooked appellant's evidence and failed to find that Survey did not follow appropriate guidelines for making a KGS determination. The Judge's discussion of the evidence and his conclusion is set forth as follows:

With respect to the second question, a USGS staff geologist testified prior to January 7, 1974, the Catclaw Draw Field was a collection of contiguous and separate undefined KGS areas as shown on Ex. G-1. On January 7, 1974, following extensive study of approximately two months duration, the undefined KGS area was extended as shown in blue on Ex. G-2. Thus extended, the undefined KGS area adjoined Parcel No. 52 immediately to the south. Mr. Aguilar, the staff geologist, on approximately March 25, 1974, in clearing the Alexander lease application, discovered there was a well being drilled (Penrol Oil Co. No. 1 Allied, see Ex. G-14) approximately two miles north of Parcel 52. The District Engineer was contacted by telephone to determine the status of the well and he reported that drill stem tests were run on February 27, 1974, showing Wolf Camp maximum flow rate 6,086 MCF gas per day, and on March 8, 1974, showing Morrow maximum flow rate of 700 MCF gas per day. This information was discussed with Mr. VanSickle, the Area Geologist, and after viewing the general area and considering particularly the information from Penroc together with the production records from the Ralph Lowe-Hanson well, approximately a mile to the east, the David Fasken No. 1 approximately one-half mile to the south and David Fasken No. 2 a mile to the southeast, it was determined that Wolf Camp and Morrow Reservoirs were present, and an undefined addition to the undefined KGS for the Catclaw Draw Field was made which encompassed Parcel 52. See Ex. 4-14. Fasken No. 1 had recovered gas and condensate from Wolf Camp, and gas from Morrow on drill stem tests prior to November 30, 1973, and Fasken No. 2 in a drill stem test in Morrow produced at a rate of 2,520 MCF gas per day, although, neither well was completed in these formations. Mr. VanSickle testified to generally the same effect.

It is Alexander's position that USGS had insufficient information to make the KGS determination on March 25. Mr. Robert Cress, a geological engineer, testified that he compiled stratigraphic cross-sections (Ex. R-12 and Ex. R-13) of the four wells in question, and considering interval, porosity and permeability information from these cross-sections, was of the opinion that the extension of the undefined KGS on March 25 was premature. He might have established an independent KGS on perhaps half a section in the area surrounding Penroc, but not an undefined KGS extension of the size determined by USGS. He acknowledged that he had never had occasion to establish a KGS and does not know the technicalities involved, except in the general way. Most of his work is based on commercial aspects. Mr. Raymond Lamb, a geologist and engineer, also testified that he felt the undefined KGS extension was premature, but acknowledged that his standards in advising commercial clients were different and more strict than that used by the USGS.

Based on the above, it cannot be said that Alexander has established a clear and definite showing of error in Geological Survey's KGS determination of March 25, 1974. As Mr. Van Sickle testified, from the drilling information available on March 25, 1974, the inference was that there would be possible Wolf Camp production and Morrow Reservoirs present with hydrocarbons extending from the Fasken wells up to and probably north of the Penroc well. There was certainly no guarantee of commercial production, but all the evidence pointed to the existence of reservoirs in the area. Further, the use of the drill stem test information used in making this particular determination was not in any way unique and the same procedure had been used by USGS in making other KGS determinations. In fact, the procedures set out by USGS in defining a KGS (Geological Survey Circular 419, Ex. G-4) were generally followed and there is great latitude in using these guidelines.

For the above reasons, it is concluded that USGS had sufficient information to make the KGS determination on March 25, 1974.

Recommended Decision pp. 7 and 8.

The Judge's use of the March 25, 1974, date as the date of the KGS determination undoubtedly was based upon his interpretation and

application of the court's decision in Skelly, *supra*, here. In Skelly, the court emphasized the necessity for Survey to know and evaluate all the facts necessary to make the KGS determination and used the date of Survey's determination, rather than an earlier date when a certain well was drilled, as the date of "ascertainment" required by 43 CFR 3100.7-3. Because this case was remanded to this Department for reconsideration in light of Skelly, we are bound to follow it in this case and, therefore, we shall use March 25, 1974, as the date of Survey's ascertainment of the KGS. ^{1/} To this extent then, we must modify our previous decision in 21 IBLA 56, where we concluded the requisite information for making the KGS determination was known prior to March 12, 1974, the date Martinez conditionally signed the lease, and hence had been ascertained by that date.

Appellant contends that there was insufficient information upon which Survey could make a KGS determination as of March 25, 1974, or earlier dates. His witnesses offered their opinions to this effect. Their opinions were based upon their analyses of the data available at that time. We have reviewed appellant's evidence. It is primarily a critique of the data considered by the Survey employees and of their methods of analyzing it. Appellant specifically contends the evidence shows that the Survey employees did not follow guidelines set forth in USGS Circular 419 (Govt. Exh. 4). He lists six factors as being required for evaluation; namely, structure, stratigraphic traps, porosity, permeability, water and gas pressure. He specifically states:

In connection with such procedure, the circular is singularly clear, that such an evaluation consists not

^{1/} Judge Thompson believes the Skelly case is an illustration, however, of bad facts creating questionable law. Because of the particular facts in that case, as well as the present, its import should be carefully scrutinized before applying it further. The court's decision overlooks decades of administrative practice, and also concepts which have been long ingrained in the field of public land law, such as the doctrine of constructive notice and the doctrine of relation back. Under these concepts, the date of "ascertainment," as used in regulation 43 CFR 3100.7-3, could very well be read to mean the day facts are available from which a determination could be made. The difficulty with the court's decision in taking a literal meaning outside of its practical and past administrative context is that it opens the door too widely to the possibility of concealment and fraud whereby offerors who may be aware of facts which would warrant a KGS determination seek to take advantage of any delays in Survey's acquiring the knowledge. Hopefully, this problem and possibility can be avoided by appropriate amendment and clarification of the regulations.

simply as a suggested guideline, but as a required premise for known geologic structure determination. An evaluation of the net effect of the several factors stated "are for all purposes required by the provisions of the Mineral Leasing Act and pertinent regulations." [Emphasis by appellant.]

A reading of the entire statement shows that the determinations are for the purposes required by the Act and regulations -- not that all factors must always be considered to make a proper KGS determination. To place the statement in proper focus, we quote the entire paragraph to which appellant refers from p. 5 of the Circular 419, as follows:

PROCEDURE

Under the authority delegated by 43 CFR 192.6, the Director of the Geological Survey determines whether lands are or are not within any known geologic structure of a producing oil or gas field. In making these determinations it is recognized that the extent and position of any oil and gas accumulation in a known geologic structure, though primarily influenced by structure, is also influenced by such factors as stratigraphy, porosity, permeability, and by water and gas pressure in the reservoir. Evaluation of the net effect of these several factors is the result sought by the determination of definition of the known geologic structure. These determinations are for all purposes required by the provisions of the Mineral Leasing Act and the pertinent regulations, particularly,

1. For appropriate determination of the competitive and noncompetitive leasing provisions under * * *.

Thereafter are listed three specific instances where a KGS determination is required under the law, including appropriate determination of competitive and noncompetitive leasing under the Mineral Leasing Act. The circular then discusses the procedural differences between a defined and an undefined KGS and the reasons for use of the undefined structure procedure rather than the formalized defined procedure. This is set forth also at p. 5, as follows:

Procedure for structure undefined

Inasmuch as definitions are required for purposes of administration immediately after the initial discovery is made in a new field, or extensions are made by outpost drilling, when knowledge both of the productive limits of the field and of the physical factors which determine such

limits is at a minimum, known geologic structures undefined are established as an administrative expedient for appropriate action on the three regulations stated above. [Emphasis added.]

The essential differences between defined and undefined known geologic structure definitions, and the reason therefor, is that the formality and detail in the defined procedure does not permit the necessary day-to-day determinations needed by the Bureau of Land Management in current administration of the leases and lease applications.

Undefined known geologic structures are of two types, namely:

1. An area where discovery necessitates the defining of a new productive area, and revisions thereof.
2. An area where development around a previously established defined structure warrants an extension of the established known geologic structure.

In connection with undefined geologic structures, available information, generally consisting of data relating to a single well or a few wells, together with available geologic information, is reviewed by geologists; and a memorandum is sent to the manager of the appropriate land office making a determination that certain lands are as of a certain date "on structure" or within an undefined addition to a previously defined structure. Although the lands determined to be on this structure are outlined on a work map, no plat is prepared for distribution or for filing in the Land Office, and notice of the determination is not published in the Federal Register because of its temporary nature.

The underscored statement, above-quoted, reflects the fact that undefined KGS determinations must be made expeditiously at times in order to administer the Mineral Leasing Act, and that they must be made where information is at a minimum. This clearly suggests that for Survey's purposes such a determination must be made with what information is available. Obviously, when experts such as appellant's witnesses offer their opinions to clientele in the commercial marketplace on the wisdom of expending substantial sums of money to drill in an area, there is, or should be, a very different standard of evaluation and degree of data available. To the extent appellant's expert witnesses' opinions reflect that type of a commercial evaluation alone they cannot be accepted as showing error in Survey's determination.

While the evidence showed that the Survey employees who made the KGS extension determination did not consider all of the factors indicated in the circular, we do not find that this establishes that their determination was in error. We cannot accept appellant's contention, in effect, that their determination was not authorized or was improper because several factors mentioned in the circular were not considered. The circular is an informational statement of procedures and practices utilized by Survey in 1959 in making KGS determinations. Its value is in setting forth in a general way how the different KGS determinations are made, the reasons therefor, and procedures. The circular does not purport to be, and is not, comparable to a specific Secretarial directive, such as the order discussed previously requiring a KGS determination by Survey before a lease issues. Appellant makes much of the fact that the well data used by Survey in extending the KGS did not show that the wells were producing then. Some of appellant's positions and that of Survey can be seen in the following questions and answers by appellant's lawyer at the hearing and Donald O. VanSickle, Survey's area geologist:

Q. [W]hen you come up here, however, to this Lowe well, the Fasken well and the Fasken well, only two of which tested the Morrow, and neither of which completed in it, you don't have any information, except presence. You don't have information to show known to be productive, so how can you say that other lands are presumed to fit within a known geologic structure, because it doesn't fit the definition.

A. Both Fasken wells could have produced from the Morrow, had they been completed in the Morrow on the basis of their drill-stem test data. Now, whether they could have been commercially productive or not, I don't know.

Q. That's not what the definition says, it says, determined to be productive.

A. Right.

Q. None of these were determined to be productive.

A. Well, the drill-stem tests produced hydrocarbons; the reservoir is there; therefore, as far as our administrative actions are concerned, it's presumed, by me, to be productive.

(Tr. 231-232).

Appellant attacks the use of the drill-stem tests. To the extent such tests are used to evaluate the possibility that a well can produce hydrocarbons and the existence of hydrocarbons, we adhere to our view set forth in the original decision in this case that use of such tests is proper in making a KGS determination.

Much of appellant's criticism of the determination here is that the data used did not show there was production from the wells used in making the extension. As the above quotation demonstrates, Survey employees considered the drill-stem tests as sufficiently showing the wells had a productive capability. From that, together with other information on the structure, it was geologically inferred that the KGS should be extended to include the area in dispute here. If appellant is contending that there must be actual production within the extension at the time the extension determination is made, that cannot be accepted. Evidence that there is no nearby production is not sufficient to show error. James A. Wallender, 26 IBLA 317 (1976).

43 CFR 3100.0-5(a) provides: "A known geologic structure is technically the trap in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive." (Emphasis added.) As the regulation indicates by use of the word "presumptively," the entire area within a KGS need not be proven productive. "The boundaries are defined for administrative purposes but can not be taken as absolutely and accurately showing the extent in each instance of the geologic structure producing oil or gas." Columbus C. Mabry, 55 I.D. 530, 531 (1936). KGS determinations do not guarantee that all the land included will be productive.

[T]hey do no more than to announce that on the basis of geological evidence, the Department has found that a certain geological structure constitutes a trap in which oil or gas, or both, have accumulated. * * * There is no prediction as to future productivity, or statement as an existing fact that anything is known about the productivity of all the land included in a structure. Columbian Carbon Company, [A-28706 (October 10, 1962)].

McClure Oil Co., 4 IBLA 255, 259 (1972).

[3] One who challenges the classification of lands as within a KGS has the burden of showing that the determination is in error, and the classification will not be disturbed in the absence of a clear and definite showing of error. Curtis Wheeler, *supra*; David A. Provinse, *supra*; James A. Wallender, *supra*; T. D. Skelton, 9 IBLA 322 (1973); Charles J. Babington, 4 IBLA 43 (1971).

We have considered appellant's contentions in light of the factual record made at the hearing, but we are not persuaded that there has been such a clear and definite showing of error that the KGS determination should be disturbed.

To conclude, following the court's directive and our review of the record, we agree that the lands in question were properly ascertained to be within a KGS as of March 25, 1974, as found by Administrative Law Judge Morehouse. Although generally a lease is deemed to have issued when it is executed by the authorized officer, Martinez, the signing officer, had no authority to sign the lease on March 12, 1974, because he failed to follow the Secretarial order requiring that lease offers be sent to the Geological Survey for a KGS determination prior to issuance. Therefore, Martinez's action did not bind the Department and when BLM received the information from Survey that the land was within a KGS it promptly rejected the offer. This action was correct. The offer had to be rejected, and to the extent it may be considered that a lease may have issued, the lease was cancelled in our prior decision. We adhere to that result for the reasons herein stated.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's rejection of lease offer NM-20947 is affirmed for the reasons stated above. The Board's prior decision at 21 IBLA 56 is reaffirmed as modified herein as to the date of ascertainment of the KGS.

Joan B. Thompson
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

